

1 MATTHEW D. POWERS (Bar No. 104795)

2 matthew.powers@tensegritylawgroup.com

3 WILLIAM NELSON (Bar No. 196091)

4 william.nelson@tensegritylawgroup.com

5 ROBERT GERRITY (Bar No. 268084)

6 robert.gerrity@tensegritylawgroup.com

7 NATASHA SAPUTO (Bar No. 291151)

8 natasha.saputo@tensegritylawgroup.com

9 SAMANTHA JAMESON (Bar No. 296411)

10 samantha.jameson@tensegritylawgroup.com

11 JENNIFER ROBINSON (Bar No. 270954)

12 jen.robinson@tensegritylawgroup.com

13 WANLI CHEN (Bar No. 300254)

14 wanli.chen@tensegritylawgroup.com

15 TENSEGRITY LAW GROUP, LLP

16 555 Twin Dolphin Drive, Suite 650

17 Redwood Shores, CA 94065

18 Telephone: (650) 802-6000

19 Fax: (650) 802-6001

20 Attorneys for Plaintiff

21 ARISTA NETWORKS, INC.

22 [Additional Counsel Listed in Signature Block]

23
24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA
26 SAN JOSE DIVISION

27 ARISTA NETWORKS, INC.,

28 Plaintiff,

v.

CISCO SYSTEMS, INC.,

Defendant.

Case No. 5:16-CV-00923-BLF

**ARISTA NETWORKS, INC.'S
OPPOSITION TO CISCO
SYSTEMS, INC.'S PETITION FOR
INTERLOCUTORY REVIEW**

Date: September 20, 2018

Time 9:00 A.M.

Judge: Hon. Beth Labson Freeman

Dept: Courtroom 3

DEMAND FOR JURY TRIAL

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1 **I. INTRODUCTION**

2 Cisco’s motion to certify certain issues for interlocutory appeal is its fourth attempt to delay trial
 3 on Arista’s antitrust claims, which were first filed in January 2016. As part of its strategy to delay trial
 4 at all costs, Cisco: successfully opposed the inclusion of those claims in the copyright case; obtained a
 5 stay of those claims for nearly seven months, until after the copyright trial; and again sought a stay as
 6 part of its motion to dismiss in September 2017.¹ Cisco’s latest attempt to delay Arista’s claims again
 7 provides no reason for further delay, and no reason to certify any issue for appeal.²

8 First, neither issue Cisco seeks to appeal presents a “controlling question of law,” as required
 9 under 28 U.S.C. § 1292(b), the statute authorizing permissive interlocutory appeals. Instead, Cisco has
 10 simply lodged its disagreement with the Court’s application of the existing Ninth Circuit law (including
 11 *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006), and *Am. Prof'l Testing Serv., Inc. v. Harcourt*
 12 *Brace Jovanovich Legal & Prof'l Pub'ns, Inc.*, 108 F.3d 1147 (9th Cir. 1997)) to the disputed and
 13 undisputed facts before it at summary judgment. However, a “mixed question of law and fact or the
 14 application of law to a particular set of facts,” like those presented by Cisco’s petition, is “not appropriate
 15 for permissive interlocutory review.” *Johnson v. Serenity Transp., Inc.*, No. 15-cv-02004-JSC, 2017
 16 U.S. Dist. LEXIS 117192, at *3-4 (N.D. Cal. July 26, 2017) (internal citations omitted). Instead, Cisco
 17 can and should appeal the Court’s reasoning following final judgment.

18 Second, Cisco’s “strong disagreement with the Court’s ruling” determining the applicability of
 19 these cases to the facts “is not sufficient for there to be a substantial ground” for difference of opinion
 20 as required under Section 1292(b). *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (internal
 21 quotes and citations omitted). There are no “novel and difficult questions of first impression” presented
 22 here, nor can Cisco show that “the circuits are in dispute on the question and the court of appeals of the

23 ¹ D.I. 144 (9/7/17 Hearing on Cisco’s Motion to Dismiss) at 23:25-24:6 (Counsel for Cisco: “There’s a
 24 couple options that your Honor has. And, you know, whatever flavor you choose, it’s all the same to
 25 Cisco. **You could stay the antitrust case until after the Judge White case.** You could, what I’m
 recommending, so that you don’t have a stay going on forever, [] is to dismiss without prejudice.”)

26 ² Cisco’s Brief fails to justify certification for interlocutory review despite using seven more pages than
 27 this Court’s rules allow without seeking permission. Judge Freeman’s Standing Order For Civil Cases
 28 (permitting only 10 pages for opening and responsive briefs, other than for motions brought under
 Federal Rules of Civil Procedure 12, 23, 56, 59, or 65; motions brought under California’s anti-SLAPP
 statute; social security appeals; bankruptcy appeals; and claim construction briefing.).

1 circuit has not spoken on the point” —which is required to demonstrate a substantial ground for
 2 difference of opinion under Section 1292(b). *Id.* Instead, both of Cisco’s proposed issues for appeal
 3 concern the application of settled, controlling Ninth Circuit authority—*Sosa* and *Harcourt Brace*,
 4 respectively—to the facts at hand.

5 Finally, Cisco’s self-serving statement that certification will “materially advance the ultimate
 6 termination of the litigation” because Cisco is unlikely to settle if it has to go to trial on these claims
 7 (Br. at 13) should be given no weight. Cisco may not force an interlocutory appeal because it is unhappy
 8 that losing its summary judgment motion means the risk of an adverse verdict has increased. In any
 9 event, impending trial is *more* likely to promote settlement, not less.

10 Cisco’s further efforts to delay trial should end, and its motion should be denied.

11 **II. LEGAL STANDARD**

12 Interlocutory review is appropriate only in “extraordinary cases, ‘not simply where issues are
 13 hard or questions are somewhat new.’” *Dillon v. Murphy & Hourihane*, No. 14-cv-01908-BLF, 2014
 14 U.S. Dist. LEXIS 150270, at *6 (N.D. Cal. Oct. 22, 2014). *See also In re Cement Antitrust Litig.*, 673
 15 F.2d 1020, 1025-28 (9th Cir. 1982)(permissive review to be permitted only “only in exceptional
 16 situations.”). As such, movants have a “heavy burden to show that ‘exceptional circumstances justify a
 17 departure from the basic policy of postponing appellate review until after the entry of a final judgment.’”
 18 *Nanavati v. Adecco USA, Inc.*, No. 14-cv-04145-BLF, 2015 U.S. Dist. LEXIS 85113, at *1-2 (N.D. Cal.
 19 June 30, 2015) (Freeman, J.). And because 35 U.S.C. § 1292(b) is a “departure from the normal rule that
 20 only final judgments are appealable” it “therefore must be construed narrowly.” *James v. Price Stern
 Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002).

22 In order to demonstrate that certification for interlocutory appeal is warranted, movants must
 23 demonstrate: (1) “a controlling question of law”; (2) “substantial grounds for difference of opinion,”;
 24 and (3) “that an immediate appeal may materially advance the ultimate termination of the litigation.” *In
 25 re Cement Antitrust Litig.*, 673 F.2d 1020, 1025-28 (9th Cir. 1982). Ultimately, “[t]he decision to certify
 26 an order for interlocutory appeal is committed to the sound discretion of the district court.” *Johnson v.
 27 Serenity Transp., Inc.*, No. 15-cv-02004-JSC, 2017 U.S. Dist. LEXIS 117192, at *3-4 (N.D. Cal. July
 28 26, 2017). Even where issues are certified for interlocutory appeal, stay of the district court proceeding

1 is not automatic, and Cisco has not explicitly sought a stay. 28 U.S.C. § 1292(b) (“application for an
 2 appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of
 3 Appeals or a judge thereof shall so order.”).

4 III. BACKGROUND

5 In its search for a “controlling question of law” to support its certification motion, Cisco avoids
 6 the central finding of the Court’s order denying Cisco’s summary judgment motion: that Cisco’s CLI
 7 lawsuit and communications surrounding it are not protected “petitioning” activity shielded by the
 8 *Noerr-Pennington* doctrine under the two-step *Hynix* test adopted by several district courts of the Ninth
 9 Circuit. *See Hynix Semiconductor Inc. v. Rambus, Inc.*, 527 F. Supp. 2d 1084, 1098 (N.D. Cal. 2007).
 10 The Court will find no mention of *Hynix* at all in Cisco’s motion, nor any challenge of the Court’s
 11 determination that “there is a genuine issue of material fact on whether Cisco’s statements,” such as the
 12 blog post of its general counsel informing the industry that the CLI should not be considered an “industry
 13 standard” despite years of marketing it as one, “constituted a reversal of the purported open-CLI policy
 14 and amounted to exclusionary conduct.” D.I. 281 at 24. Instead, Cisco requests certification only of two
 15 issues: 1) whether *Noerr* protection extends to all “truthful public statements incidental to a non-sham
 16 litigation,” and 2) whether the *Harcourt Brace* decision should extend “beyond statements that expressly
 17 disparage the rival.” Br. at 1.

18 IV. ARGUMENT

19 A. Cisco Has Failed To Advance A Controlling Question of Law For Appeal

20 Neither of Cisco’s two proposed appeal issues presents a “controlling question of law” for appeal
 21 within the meaning of Section 1292(b). Cisco insists that they are “controlling” because it contends their
 22 resolution on appeal could materially affect the outcome of this litigation. Br. at 6. That is not enough,
 23 however; otherwise every appeal worth raising would merit interlocutory appeal. Cisco fails to
 24 demonstrate the other half of the equation: that its issues are a “question of law,” rather than a question
 25 of this Court’s application of the law to the facts before it. Only pure questions of law can support a
 26 petition under Section 1292(b); a “mixed question of law and fact or the application of law to a particular
 27 set of facts” are “not appropriate for permissive interlocutory review” and are left for appeal in the
 28 normal course. *Johnson*, 2017 U.S. Dist. LEXIS 117192, at *3-4 (N.D. Cal. July 26, 2017). *See also*

1 *Allen v. Conagra Foods, Inc.*, 2013 U.S. Dist. LEXIS 161231, 2013 WL 6000456, at *3 (N.D. Cal. Nov.
 2 12, 2013) (denying section 1292(b) certification because proposed appeal involved application of the
 3 relevant facts to a regulation); *Steering Comm. v. United States*, 6 F.3d 572, 575 (9th Cir. 1993) (holding
 4 a pure legal question was identifiable and therefore the Ninth Circuit could resolve all the questions
 5 material to the order).

6 Both of Cisco’s purported controlling “questions of law” amount to Cisco’s disagreement with
 7 the Court’s application of the law to the facts before it, and as such do not meet the “controlling question
 8 of law” test of Section 1292(b). As to the first appeal issue, the Court’s determination that Cisco’s CLI-
 9 related communications, such as the blog posts of Cisco’s general counsel, were not conduct “incidental”
 10 to litigation within the scope of the Ninth Circuit’s decision in *Sosa v. DIRECTV, Inc.*, 437 F.3d 923,
 11 934 (9th Cir. 2006), is unmistakably a mixed question of fact and law that turns on the Court’s
 12 application of law to the facts. The Court’s Summary Judgment Order characterized Cisco’s reading of
 13 *Sosa* as “unpersuasive” and “overly broad,” D.I. 281 at 21, explaining that the Ninth Circuit found in
 14 *Sosa* that “conduct incidental to the *prosecution*” of a lawsuit is *Noerr*-protected activity:
 15 “communications between private parties are sufficiently within the protection of the Petition Clause to
 16 trigger the *Noerr–Pennington* doctrine, so long as they are *sufficiently related to petitioning activity*.”
 17 *Id.* (quoting *Sosa*, 437 F.3d at 935). Under that test, the Court then found that Cisco’s CLI-related
 18 communications “have no relation to the prosecution of the CLI lawsuit as they are merely statements
 19 about the status of the parties’ litigation and Cisco’s intellectual property rights,” and as such were not
 20 communications “incidental” to the litigation which warranted First Amendment protection under *Sosa*.
 21 The Court noted explicitly that “the First Amendment concerns in *Sosa* are absent here,” distinguishing
 22 between the demand letters at issue in *Sosa* and the CLI-related communications here and finding that
 23 the latter “had little relevance to Cisco’s ability to pursue its CLI lawsuit.” *Id.* at 21-2. Cisco’s insistence
 24 that the Court got this analysis wrong does not present a pure question of law to support interlocutory
 25 appeal.

26 Cisco tries to recast the Court’s finding as a question of law by saying it intends to seek review
 27 of whether *Noerr* protection extends to all “truthful public statements *incidental* to a non-sham
 28 litigation,” but that formulation simply ignores what the Court explicitly already found—that under

1 controlling Ninth Circuit authority, Cisco’s CLI-related communications were not “incidental” to the
 2 CLI litigation at all. There is no way to cast the Court’s decision as a pure question of law for
 3 interlocutory review, unless Cisco contends that *any statement* made by a company that has filed a
 4 lawsuit should be deemed “incidental” to litigation (and therefore protected) as a matter of law, no
 5 matter how tenuously related to litigation, as long as it is not demonstrably false. That contention is
 6 directly contrary to the Ninth Circuit’s “sufficiently related to petitioning activity” standard set out in
 7 *Sosa*, which is controlling law, and provides no basis for interlocutory appeal. Nor does any case cited
 8 by Cisco from any other Circuit vouch for such an extreme position.

9 Cisco fares no better with its second proposed issue for appeal. In seeking to appeal the Court’s
 10 determination that the *Harcourt Brace* presumption of *de minimis* competitive impact for disparaging
 11 statements about a competitor was “inapplicable” to Cisco’s exclusionary conduct, Cisco seeks to appeal
 12 only its disagreement with how this Court applied *Harcourt Brace* to the facts – not a controlling
 13 question of law. The Court correctly found that the Cisco statements that comprise the alleged
 14 anticompetitive conduct were not disparagement of Arista at all, or even directed to Arista. Instead, they
 15 were broader statements to the industry that Cisco was now “closing” the CLI:

16 While Cisco’s blog posts contain some disparaging statements against Arista, *the posts*
 17 *also suggest that Cisco’s CLI is not an “industry standard.” . . .* When drawing
 18 reasonable inferences in favor of Arista, the Court concludes that there is a genuine issue
 19 of material fact on whether Cisco’s statements constituted a reversal of the purported
 20 open-CLI policy and amounted to exclusionary conduct. *As the anticompetitive harm*
stemming from Cisco’s purported “open early, closed late” scheme does not rely on
whether Cisco disparaged Arista, Harcourt Brace’s concern about assigning much
weight to “false or misleading” statements does not exist here. Thus, Harcourt Brace’s
six factor de minimis test is inapplicable.

21
 22 D.I. 281 at 23-24. Cisco insists that it wishes to obtain a ruling *now* that “a company’s accurate
 23 description of a lawsuit filed against a rival is to be treated as having a presumptively *de minimis* impact
 24 on competition,” “whether or not they ‘disparage’ a rival.” Br. at 14. In doing so, Cisco simply ignores
 25 the Court’s factual finding that certain of Cisco’s statements at issue were directed to other customers
 26 and competitors and were not directed (whether disparaging or not) at Arista. D.I. 281 at 23-24. Cisco
 27 also ignores the Court’s finding “that there is a genuine issue of material fact on whether Cisco’s
 28 statements constituted a reversal of the purported open-CLI policy,” and were therefore not merely

“descriptions of a lawsuit.” D.I. 281 at 23-24. As a result, not only is Cisco’s *Harcourt Brace* issue not a question of law, it is not even “controlling,” because a ruling that “a company’s accurate description of a lawsuit filed against a rival is to be treated as having a presumptively de minimis impact on competition” would not affect the Cisco conduct that goes beyond “describing a lawsuit.” *See In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025-28 (9th Cir. 1982) (“controlling” questions of law are those that may “materially affect the eventual outcome of the litigation.”)

B. Cisco’s Disagreement With The Court’s Summary Judgment Opinion Does Not Establish Substantial Grounds For Difference Of Opinion

Cisco also fails to establish that there are “substantial grounds for difference of opinion” as to the two issues it proposes for interlocutory appeal. “To determine if a ‘substantial ground for difference of opinion’ exists under § 1292(b), courts must examine *to what extent the controlling law is unclear.*” *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (denying interlocutory appeal). A substantial ground for difference of opinion may be found where “the circuits are in dispute on the question and the *court of appeals of the circuit has not spoken on the point*, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.” *Id.*

Neither appeal issue proposed by Cisco meets this test, because at bottom, they concern Cisco’s disagreement with how the Court applied settled Ninth Circuit controlling authority—not a “novel and difficult question[] of first impression.” *Couch*, 611 F.3d at 633. Sosa’s test for whether communications are “incidental” to litigation, and therefore protected—whether the communications are “*sufficiently related to petitioning activity*”—has been the law of the Ninth Circuit since 2006, and has been applied by courts repeatedly to determine whether communications are protected. *See, e.g., Riverbed Tech., Inc. v. Silver Peak Sys.*, 2015 U.S. Dist. LEXIS 188737, at *8 (N.D. Cal. April 7, 2015) (commercial communication about pending litigation not “in furtherance or incidental” to litigation); *Nelson v. Nelson*, No. 2:17-cv-1333-EFB, 2018 U.S. Dist. LEXIS 45873, at *10 (E.D. Cal. Mar. 19, 2018) (settlement discussions found “incidental” to litigation); *Adidas Am., Inc. v. TRB Acquisitions Ltd. Liab. Co.*, No. 3:15-cv-2113-SI, 2017 U.S. Dist. LEXIS 9228, at *9 (D. Or. Jan. 23, 2017) (pre-suit investigation found “incidental” to litigation); *Cascades Comput. Innovation LLC v. RPX Corp.*, No. 12-CV-1143 YGR, 2013 U.S. Dist. LEXIS 170517, at *61 (N.D. Cal. Dec. 3, 2013) (refusal to settle licensing dispute not “incidental” to litigation). As such, Cisco cannot show that the “court of appeals

1 of the circuit has not spoken on the point”; it has, and the only questions remaining concern how the
 2 *Sosa* “sufficiently related to litigation” standard should be applied to specific fact patterns. As such,
 3 Cisco’s argument that other circuits might have decided the question differently, under a different
 4 standard than *Sosa*, Br. at 11-12, is simply irrelevant under the 1292(b) standard.

5 For the same reasons, Cisco’s first appeal issue does not present a “novel and difficult question[]
 6 of first impression.” *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). As noted above, district
 7 courts within the Ninth Circuit have repeatedly applied *Sosa* to the facts before them; this Court’s
 8 summary judgment opinion is no different. That the full scope of controlling authority and its
 9 applicability to each set of facts is not set out in advance by the Ninth Circuit’s decision, but must instead
 10 be determined on a case by case basis, does not create “substantial grounds for difference of opinion.”
 11 See *Couch*, 611 F.3d at 633 (“just because a court is the first to rule on a particular question or just
 12 because counsel contends that one precedent rather than another is controlling does not mean there is
 13 such a substantial difference of opinion as will support an interlocutory appeal.”). At bottom, neither
 14 Cisco’s “strong disagreement with the Court’s ruling,” nor “the possibility that settled law might be
 15 applied differently” supports interlocutory review. *Id.*

16 Similarly, *Harcourt Brace*’s holding that disparaging statements directed at a rival should be
 17 presumed to have *de minimis* competitive effect has been controlling authority in the Ninth Circuit since
 18 1997. While Cisco contends that its appeal to extend *Harcourt Brace* to cover all statements about a
 19 rival, whether disparaging or not, is one that presents “substantial grounds for difference of opinion,”
 20 that assertion is indefensible in view of Cisco’s failure to identify *any* district court of the Ninth Circuit
 21 extending *Harcourt Brace* in that manner during the 25-year period since it issued. Arista is unaware of
 22 any such decision, and presumably there is none, because Cisco has identified only one case (from the
 23 Third Circuit) that purportedly demonstrates that a “reasonable judge could find” in favor of Cisco on
 24 this point. Br. at 16. That case is inapplicable for the same reasons the Court found *Harcourt Brace*
 25 inapplicable (it concerned allegations of false disparagement of a rival, not statements to an industry as
 26 a whole). *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 401 (3d Cir. 2016). More fundamentally,
 27 Cisco’s second proposed appeal issue presents neither a “novel and difficult question[] of first
 28 impression” nor that “the circuits are in dispute on the question and the court of appeals of the circuit

1 has not spoken on the point.” *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Cisco can
 2 only suggest “the possibility that settled law might be applied differently,” which is insufficient for
 3 interlocutory appeal.

4 **C. The Issues Chosen By Cisco For Immediate Appeal Would Not Materially Advance
 The Termination of the Litigation**

5 There is no merit to Cisco’s assertion that interlocutory appeal “may materially advance the
 6 ultimate termination of the litigation,” because delaying trial in favor of an appeal process whose median
 7 time from filing to resolution is 15 months³ will not “advance” the termination of the litigation in any
 8 way, given that trial and a jury verdict is but three months away. Cisco’s assertion that certification for
 9 appeal, and delay in trial, is the fastest way to terminate the litigation is also cynical, given Cisco’s
 10 insistence that its copyright claims be given the earliest possible trial date. As this Court has recognized
 11 in connection with Cisco’s earlier attempts at delay:

12 I’m just a little concerned [that] the whole process has been delayed by Cisco, and that’s
 13 troubling to me. The whole process on the CLI case was let’s speed this along. ***So we
 sped along the one where you thought you had upside***, and it worked out the way it
 14 worked out, and we’re midstream on [th]at. ***And now when you change sides of the aisle
 here you want to slow it down.***

15
 16 D.I. 106 (3/2/2017 Case Management Conference).⁴ Given the Court’s comments at the September 2017
 17 hearing on Cisco’s motion to dismiss that if the August 2018 trial date slips, Arista “would lose a couple
 18 of years” while waiting for trial, the Court should exercise its discretion to deny Cisco’s attempt to
 19 ensure speedy trial on its claims, but extensive delay for Arista’s. D.I. 144 (9/7/17 Hearing on Cisco’s
 20 Motion to Dismiss).⁵ Jury trial, and the verdict that will issue, are far more likely to materially advance
 21 the termination of the litigation than any further delay in the trial date would.

22 Cisco next asserts that, absent rulings from an appellate court on these issues, “neither side will

23 ³ Ex.1 http://cdn.ca9.uscourts.gov/datastore/general/2017/04/19/AO_9th_Year%20end_6years.pdf

24 ⁴ Nor is it self-evident that Cisco’s proposed issues for appeal are case-dispositive. A favorable ruling on
 25 Cisco’s *Sosa* question could well still leave open the factual question of whether Cisco’s blog posts were
 26 “incidental to litigation” under some new standard. Similarly, even following a favorable ruling for
 27 Cisco on its *Harcourt Brace* issue leaves open the factual question whether Cisco’s blog posts closing
 the CLI were directed to Arista at all, rather than to the industry as a whole. As a consequence, the most
 likely result, win or lose, is that the case must go to trial.

28 ⁵ Moreover, since interlocutory appeal is discretionary for appellate courts as well, certification of these
 issues could cause the trial date to slip, and the Ninth Circuit could still decline the petition.

1 have a powerful incentive to settle, so that certifying these issues for appeal would “materially advance
 2 the ultimate termination of the litigation” via settlement. Br. at 17; *see also id.* at 13-14. Cisco’s
 3 ***unilateral*** assertion that it is unlikely to settle if it has to go to trial (Br. at 13) should be given no weight.
 4 Cisco should not be permitted to bootstrap into good cause for discretionary appeal its unhappiness that
 5 its risk profile for settlement has changed now that summary judgment has been denied, and it must face
 6 a jury trial and a possible adverse verdict on Arista’s claims. In any event, as the Court is well aware,
 7 Cisco has it backwards: impending trial is ***more*** likely to promote settlement, not less, and further delay
 8 simply removes settlement pressure from both sides.

9 **V. CONCLUSION**

10 For the foregoing reasons, Arista respectfully requests Cisco’s motion for certification for
 11 interlocutory appeal be denied.

12
 13
 14 Date: May 31, 2018

Respectfully submitted,

15
 16 _____ /s/ *Matthew D. Powers.*
 17 MATTHEW D. POWERS (SBN 104795)
 18 WILLIAM NELSON (SBN 196091)
 19 ROBERT GERRITY (SBN 268084)
 20 NATASHA SAPUTO (SBN 291151)
 21 SAMANTHA JAMESON (Bar No. 296411)
 22 JENNIFER ROBINSON (Bar No. 270954)
 23 WANLI CHEN (Bar No. 300254)
 24 TENSEGRITY LAW GROUP, LLP
 25 555 Twin Dolphin Drive, Suite 650
 26 Redwood Shores, CA 94065
 27 Telephone: (650) 802-6000
 28 Facsimile: (650) 802-6001
 Email:
matthew.powers@tensegritylawgroup.com
william.nelson@tensegritylawgroup.com
robert.gerrity@tensegritylawgroup.com
natasha.saputo@tensegritylawgroup.com
samantha.jameson@tensegritylawgroup.com
jen.robinson@tensegritylawgroup.com
wanli.chen@tensegritylawgroup.com

DAVID H. REICHENBERG (*Pro Hac Vice*)

1 COZEN O'CONNOR
2 277 Park Avenue, 19th Floor
3 New York, NY 10172
4 Telephone: (212) 883-4900
5 Fax: (646) 461-2091
6 Email:
7 dreichenberg@cozen.com

8
9 JONATHAN M. JACOBSON (NY SBN 1350495)
10 CHUL PAK (*Pro Hac Vice*)
11 WILSON SONSINI GOODRICH & ROSATI
12 1301 Avenue Of The Americas, 40th Floor
13 New York, NY 10019
14 Telephone: (212) 999-5800
15 Facsimile: (212) 999-5899
16 Email:
17 jjacobson@wsgr.com
cpak@wsgr.com

18 SUSAN CREIGHTON (SBN 135528)
19 SCOTT A. SHER (SBN 190053)
20 BRADLEY T. TENNIS (SBN 281206)
21 WILSON SONSINI GOODRICH & ROSATI
22 1700 K Street NW, Fifth Floor
23 Washington, D.C., 20006
24 Telephone: (202) 973-8800
25 Facsimile: (202) 973-8899
26 Email:
27 screighton@wsgr.com
ssher@wsgr.com
btannis@wsgr.com

28 ROBERT A. VAN NEST (SBN 84065)
29 BRIAN L. FERRALL (SBN 160847)
30 DAVID J. SILBERT (SBN 173128)
31 NICHOLAS DAVID MARAIS
32 KEKER & VAN NEST LLP
33 633 Battery Street
34 San Francisco, CA 94111
35 Telephone: (415) 391-5400
36 Facsimile: (415) 397-7188
37 Email:
38 rvannest@keker.com
bferrall@keker.com
dsilbert@keker.com
nmarais@keker.com

39 Attorneys for Plaintiff
40 ARISTA NETWORKS, INC.